

EXHIBIT K

SEP 14 2005 3:14PM HP LASERJET 3200

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David P. Page
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Miller Keffer & Bullock, PC

Fax

To: Roger Olson	From: David P. Page
Fax: (303) 293-8236	Pages: 7 including cover page
Phone:	Date: September 14, 2005
Re: Oklahoma Poultry	CC:

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 For Review
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• **Comments:**

**DEFENDANT'S
EXHIBIT**
PI-153
05-CV-0329-GKF-SAJ

PI-Olsen00005080

D1530001

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**OPL – STRATEGY/GUIDELINES FOR PRELIMINARY
INJUNCTIVE RELIEF**

I. INTRODUCTION

Goal: an injunction that there will be no land application of poultry waste above agricultural limits and Defendants must properly dispose of and manage waste (not growers).

II. LEGAL BASIS FOR PRELIMINARY INJUNCTION

Proof: Ownership of Waste

[legal authorities that this is Integrator's waste]
[proof/facts establishing ownership]

Fed R. Civ. P. 65: A preliminary injunction will issue if the moving party establishes:

- (1) irreparable injury will be suffered unless the injunction issues; [environmental injury can seldom be remedied by money damages and is often permanent or long-lasting – therefore, the balance of laws usually favor an injunction to protect the environment] *Amoco Production Co. v. Village of Gambell*, 480 U.S. 541, 545 (1987); *Castron Co. Bd. Of Comm'rs v. U.S. P & W Service*, 33 F.3d 1429, 1440 (Cir.1996) and *Wilford v. Amoco Corp.*, 1989 F Supp. 1159, 1177, (D. Wyo. 1998), *Citizens v. U.S.*, 731 F.Supp 970, 996 (D. Colo. 1989);
- (2) the threatened injury outweighs the damage the injunction may cause the opposing party; [what are Defendants' damages?]
- (3) the injunction is not adverse to the public interest; and
- (4) there is substantial likelihood of success on the merits of Plaintiff's claim. [if claim is based on – RCRA - need to prove elements and waste – imminent and substantial endangerment]

Herman v. Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting Resolution Trust Corp v. Cruce, 972 F.2d 1195, 1198 (10th Cir. 1992)); Star Fuel Marts, LLC v. Sam's East, Inc., 362 F.3d 639, 651 (10th Cir. 2004).

Proof: There are heightened proof requirements for:

- (1) a preliminary injunction that disturbs the status quo;

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- (2) a mandatory vs. a prohibitory preliminary injunction; and
- (3) a preliminary injunction that affords movant substantially all of his relief.

[NOTE: Our case includes all of these elements that would require heightened proof.]

- (4) No proof of actual injury required. It is enough to show that damage or endangerment "may" exist. Wilson v. Amoco Production, 878 F. Supp 1091, 1092 (D. Wyo. 1998).
- (5) But, a court should be cautious and will not find an imminent and substantial endangerment exists if the risk of harm is remote in time, speculative in nature and de minimis in degree. *Id.*

RCRA Citizen's Suit: To prevail on action for preliminary injunction under RCRA: follow Wilson v. Amoco Corporation, 989 F. Supp 1159 (D. Wyo. 1998).

III. PROOF OF IMMINENT AND SUBSTANTIAL ENDANGERMENT

The type of "imminent" injury that can be collected and used in the near term concerns injuries caused by bacteria, eutrophication (TPH and D.O.), sediment toxicity containing high arsenic, and violation of water quality standards (edge of field metals, phosphorus, and other impaired water segments (303(d) listings). The proof will require showing the release of hazards from poultry waste, with application, the casual connection between the release and injury and the injury or that the release may cause an injury. The following is an outline of the proof we can develop with tasks associated with development.

A. Bacteria Injury

The bacteria we have focused on are: caropylobacter (poultry/avian dominant), salmonella, e.coli, total coliform, fecal coliform, enterococcus and staphylococcus.

(1) Proof of Release and Transport from Land Application and Proximity to Injury

(a) Literature/Articles. Identify and review articles describing bacteria presence and content in poultry manure, litter and land applied fields, and near streams and rivers. [These articles would be relied upon by expert (Olson, Harwood) to testify concerning release and presence in environment in proximity to identified and potential injures.]

(b) Dr. Rod O'Connor Samples/Analysis. CDM to obtain Dr. O'Connor waste and soil analysis. Evaluate whether Dr.

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O'Connor could/should testify directly or Olson/Harwood use O'Connor's data to support their opinion on release.

- (c) Edge of Field Samples/Analysis. Use existing/current CDM analysis data (with evidences from investigators concerning recent land application on adjoining field for samples and evidence of location of active poultry houses) to show bacteria in surface water runoff. Proximity of field plus principle component analysis by CDM to show bacteria is associated with land applied poultry waste.

✓ Additional Tasks: (i) Develop new campylobacter analysis methods and collect new edge of field samples and (ii) complete CDM poultry waste and soil analysis project (waiting on Dept. of Agriculture).

- (d) Instream Samples and Analysis. Use existing/current CDM analysis data and USGS data -- base and high flows -- to show presence of bacteria and principle component analysis and high flow samples to show relationship of bacteria with poultry waste. Use historical USGS bacteria data to show "history" of probable releases.

- (e) Tenkiller Lake Samples and Analysis. Use existing/current CDM data plus historical USGS data to show presence of bacteria in lake water.

Sediment Sampling and Analysis. Use current/existing CDM data on river and lake sediment analysis along with principle component analysis to show that bacteria originated from land applied poultry waste.

- (g) Spring Water Samples and Analysis. Use current/existing CDM data that shows bacteria in spring water.

- (h) Location of Existing Active Chicken Houses, Recent Land Application, and Amount and Location of Land Application.

Testimony of expert (?) connecting and relying on investigator documented active poultry houses and recent land application. Also, computation of the amount of land application in 2005 as well as application proximity to active chicken houses using active chicken houses count and industry information as to number of poultry, flock and amount of manure produced. The concept is to use the data we have about active houses, industry information on the number of poultry per house and waste generated with an industry expert who would testify as to the amount of waste generated and industry practices to land apply

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waste near the poultry house. Opinion will quantify the amount of land applied waste recently and annually applied in the IRW. Also, the expert would testify that waste is applied at or near where it is produced.

- (1) Groundwater Infiltration. Geologist (hydrologist) (expert) to testify that the karst geology in the IRW allows for infiltration of contaminants of concern (COC). Land applied poultry waste will infiltrate groundwater in the area and show itself in springs. Additionally, this groundwater (with the contaminants) will travel to surface waters.

Task: Obtain well water samples and analysis in areas of contaminated springs and GBS victims.

- (i) Source of Bacteria. Dr. Jody Harwood will testify that the types and volume of bacteria in environment is likely from land applied poultry waste and viruses associated with it.

[PCR analysis may be used if we obtain poultry manure samples.]

(2) Proof of Injury

- (a) WQ Standard Comparison. Expert (Olson) to compare Oklahoma WQ standard to contaminant levels for bacteria analyzed in current CDWA samples from lakes and streams that exceed the standards.

- (b) Risk Assessment. Expert (Teaf/Coleman- HSWMR) to testify concerning risk and hazard of recreation users exposure to documented levels of bacteria in sediments, river waters and lake waters.

- (c) Non Attainment Listing. Testimony from DEQ or expert (Olson) concerning IRW waters that do not meet Oklahoma WQ standards and non-attaining use as reported in Oklahoma's W.Q. Assessment Integrated Report (303(d) Report).

- (d) GBS Incidents. Development of the Rutherford evidence that the area of the IRW has seen a significant increase of Guillain Barre Syndrome (GBS). With HSWMR and/or an Epidemiologist, establish that GBS is caused by bacteria (campylobacter) associated with poultry waste and that the increase of this poultry litter bacteria may have resulted in numerous new cases of GBS and/or may lead to many more new cases of GBS.

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- (e) Other Epidemiology. Possible development through local clinics of other increased disease/sickness due to high bacteria levels.
- (f) Well-Groundwater. Use spring data plus new data from wells in the area to establish high bacteria levels in groundwater. Use HSWMR risk assessment to show hazard of use of such water in potable applications, i.e., drinking, bathing, cooking, etc. Also compare groundwater analysis with groundwater W.Q. Standards (OAC 785.45-7).

B. Eutrophication Injury

(1) Proof of Release and Transport from Land Application and Proximity to Injury

(a) Literature/Articles. Identify and use articles that discuss Phosphorus in poultry waste and its transport to surface and groundwater. (Expert testimony uses again).
- Obtain and add sampling and analysis of poultry waste (Dept. of Agriculture)

(b) Edge of Field, Instream and Lake Trencher (water and sediment) Samples and Analysis. Use all data collected by CDM and using principle component analysis to establish that the Phosphorus in chicken waste is found in Lake Trencher.

Volume of Phosphorus Contribution. Need expert to review data on amount of poultry waste that is produced and land applied in the DRW and to opine that a substantial amount of Phosphorus in Trencher is from land applied chicken waste.

(d) Eutrophication and Low D.O. and THMs. Expert Welch and/or Cooke to testify that low D.O. is a result of Phosphorus loading in lakes and THMs are a result of high phosphorus, algae and reaction of chlorine to lake water.

(2) Amount of Injury.

(a) Biologist Expert. Expert (Tony Gendusa - CDM?) to testify as to affects of low D.O. and violation of W.Q. Standards, as to diversity and abundance of lake fish and wildlife.

(b) Toxicologist. HSWMR (Teat) to testify concerning data of THM formation potential, DEQ reporting data, and other samples/analysis to show, with a risk assessment for THMs associated with drinking water from the public water supplies.

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C. Sediment Injury (Toxicity)

- (1) Proof of Release and Transport: [Use same evidence as used for bacterial and eutrophication.]
- (2) Proof of Injury
 - (a) Use expert (Olson) – violations of sediment standards in areas of data collected by CDM. Add biologist expert testimony of effects on biota resulting from sediment criteria exceedances.
 - (b) Use biologist expert (CDM) to discuss sediment survey and toxicity testing results.

D. Water Quality Injury

- (1) Proof of Release and Transport:
[Use same evidence as above.]
- (2) Use CDM (Olson) to testify that current sampling and analysis data show poultry waste is violating Oklahoma W.Q. Standards.
- (3) Use DEQ to describe RW segments on non-attainment (303(d)) list.

DRAFT

EXHIBIT L

RE: results

Page 1 of 2

From: Harwood, Valerie [vharwood@cas.usf.edu]
Sent: Monday, December 11, 2006 6:57 AM
To: Tamzen Macbeth; Sorenson, Kent; Olsen, Roger
Subject: RE: results

I agree w/Tamzen and Kent. This is method development in a relatively novel research area-- nothing standard about it.

Valerie J. (Jody) Harwood
Dept. Biology, SCA 110
University of South Florida
4202 E. Fowler Ave
Tampa, FL 33620
(813) 974-1524 (Phone)
(813) 974-3263 (Fax)

From: Tamzen Macbeth [mailto:tmacbeth@northwind-inc.com]
Sent: Friday, December 08, 2006 8:15 AM
To: Sorenson, Kent; Olsen, Roger; Harwood, Valerie
Subject: RE: results

I agree with Kent. While PCR itself may be standard, the process of developing the biomarker procedure is NOT standard. In fact, we haven't even finished developing/verifying the analysis and so I think any disclosure of results at this point is premature. In addition, North Wind is not a commercial lab, and so one could argue that point as well. The entire process is highly specialized and is more appropriately considered "developmental" and "cutting edge" rather than "standard".

From: Sorenson, Kent [mailto:SorensonKS@cdm.com]
Sent: Thu 12/7/2006 9:35 PM
To: Olsen, Roger; Tamzen Macbeth; Harwood, Valerie
Subject: RE: results

Roger,
To me it comes down to your definition of "standard analytical procedures". While one could argue about whether the PCR or other techniques might be considered "standard", I would think we would be justified in saying this stuff is not standard given that we're dealing with a potential biomarker that has not previously been demonstrated, and for which we had to design new primers. In that sense this is uncharted territory. What does everyone else think?

Kent

Kent S. Sorenson, Jr., Ph.D., P.E.
Vice President
CDM
1331 Seventeenth Street, Suite 1200
Denver, Colorado 80202
Phone: (303) 383-2430 (direct)
Reception: (303) 298-1311
Fax: (303) 293-8236

2/7/2008



PI-Harwood00003465

RE: results

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E-mail: SorensonKS@cdm.com
Internet: <<http://www.CDM.com/>>

From: Olsen, Roger
Sent: Thursday, December 07, 2006 12:41 PM
To: Sorenson, Kent; Tamzen Macbeth; Harwood, Valerie
Subject: results

We are proposing to release "all analytical data" to the defendants. However, we don't want to release any of the PCR/molecular tracking results at this time. Would the following statement preclude the PCR results?

- o **We will deliver to Defendants' copies of *all* chemical and bacteriological analytical results produced by standard analytical procedures and received from commercial labs (excluding any expert directed assessment, manipulation, evaluation, &/or interpretation, and opinions of the analytical results) from all media (litter, soil, gw, surface water (lakes, rivers, streams) springs, & sediments).**

If not, any suggestion of additional or different words?

2/7/2008

PI-Harwood00003466

EXHIBIT M

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF OKLAHOMA,)	
et al.)	
)	
Plaintiffs,)	
)	
V.)	No. 05-CV-329-GKF-SAJ
)	
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FEBRUARY 21, 2008
PRELIMINARY INJUNCTION HEARING
VOLUME III

BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

APPEARANCES:

<u>For the Plaintiffs:</u>	Mr. Drew Edmondson
	Attorney General
	Mr. Robert Nance
	Mr. Daniel Lennington
	Ms. Kelly Hunter Burch
	Mr. Trevor Hammons
	Assistant Attorneys General
	313 N.E. 21st Street
	Oklahoma City, Oklahoma 73105

1 important and where emerging methods are also important as long
2 as they're based on reliable methods and good scientific
3 validation.

4 Q. And in this case you've excluded work that was not based
5 on a standard method?

6 A. Results, you mean, data?

7 Q. Uh-huh.

8 A. Yes.

9 Q. And in this case, the specific science that you are
10 offering, the specific work that you did, it's novel, isn't it?

11 A. The work that I did is based on a technique that is
12 validated reliable in many, many different fields. There are
13 aspects of uniqueness to our approach, yes, but again, it's
14 based on sound science and good validation.

15 Q. The question, Dr. Harwood, is the specific science that
16 you are offering in this case, is it novel?

17 A. I don't know if I would use the term novel. It makes it
18 sound kind of silly, but I would say it is a development of a
19 new methodology. That's what I would say.

20 Q. It's untested, isn't it?

21 A. We tested it.

22 Q. It's not a standard analytical procedure?

23 A. It's not a standard analytical procedure.

24 Q. It's more appropriately considered developmental and
25 cutting edge?

1 A. It is indeed, as I said, new. It is new method
2 development.

3 Q. So no one else has done this before?

4 A. Other people have done very similar studies. Again, the
5 EPA's own scientists are working on this methodology. They
6 have peer reviewed publications out. It's not something that
7 nobody has ever done before. It's not speculative. It's based
8 on a reliable method and strong validation procedures.

9 Q. I believe you said a moment ago that it's not novel. Can
10 we bring up Defendants' Exhibit 293? We start on page 2 of
11 this at the very bottom. I think we need to give some context
12 to this, otherwise it doesn't make sense and we want it to be
13 fair. Does this begin with an e-mail from Roger Olsen to
14 various people, including you?

15 A. Yes, it does.

16 Q. And does he say, "We are proposing to release all
17 analytical data to the defendants. However, we don't want to
18 release any of the PCR molecular tracking results at the time.
19 Would the following statement preclude the PCR results?" And
20 the statement is, "We will deliver to defendants copies of all
21 chemical and bacteriological analytical results produced by
22 standard analytical procedures and received from commercial
23 labs, excluding any direct expert directed assessment
24 manipulation, evaluation and our interpretation and opinions of
25 the analytical results from all media, litter, soil

EXHIBIT N

EDMONDSON vs. TYSON, et al.
VALERIE J. HARWOOD

4:05-CV-00329
1/29/08

Page 1

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

W. A. DREW EDMONDSON, in his))
capacity as ATTORNEY GENERAL))
OF THE STATE OF OKLAHOMA and))
OKLAHOMA SECRETARY OF THE))
ENVIRONMENT C. MILES TOLBERT,))
in his capacity as the))
TRUSTEE FOR NATURAL RESOURCES))
FOR THE STATE OF OKLAHOMA,))
Plaintiffs,))
vs.))
TYSON FOODS, INC., et al,))
Defendants.))

4:05-CV-00329-TCK-SAJ

THE VIDEOTAPED DEPOSITION OF

VALERIE J. HARWOOD, Ph.D., produced as a witness
on behalf of the Defendants in the above styled and
numbered cause, taken on the 29th day of January,
2008, in the City of Tulsa, County of Tulsa, State
of Oklahoma, before me, Bonnie Glidewell, a
Certified Shorthand Reporter, duly certified under
and by virtue of the laws of the State of Oklahoma.

EDMONDSON vs. TYSON, et al.
 VALERIE J. HARWOOD

4:05-CV-00329
 1/29/08

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<p>1 for microbial analytes in one sample type, e.g. 2 Salmonella species in food but have not yet been 3 written for other sample types. In such cases, best 4 laboratory practices are that an existing standard 5 method is adapted for the new sample type which 6 employs similar principles for isolation, 7 characterization and confirmation of the organisms. 8 "Defined standard methods for the enumeration 9 of the following microbial analytes in water exist: 10 Total coliforms, fecal coliforms, E. coli, 11 Escherichia coli, Enterococci and Staphylococcus 12 species. In addition, standard methods for the 13 Examination of Water and Wastewater contains 14 suggested methods" -- 15 MR. BULLOCK: Doctor, you might slow down. 16 The reporter is beginning to breathe hard. 17 THE WITNESS: So starting with the list 18 again, "total coliforms, fecal coliforms, 19 Escherichia coli, Enterococci and Staphylococcus 20 species. 21 "In addition, standard methods for the 22 examination of water and wastewater contains 23 suggested methods and guidelines for the 24 Campylobacter species and Salmonella species and the 25 FDA Bacteriological and Analytical Manual for</p>	<p>1 Q Can you read the first two sentences of that 2 paragraph? 3 A "Regarding 2.2.3 to 2.2.4.2, the supporting 4 documents are from posters and reports not from 5 peer-reviewed journal articles. As such, they do 6 not carry the scientific weight of peer-reviewed 7 publications. 8 Q What do you mean, "the scientific weight of 9 peer-reviewed publications"? 10 A Peer-reviewed publications are the scientific 11 community's way of sharing their data and their 12 results and disseminating progress in science among 13 the community. So the peer-reviewed -- peer review 14 occurs when one sends the work out to a journal for 15 potential publication, and the editors of the 16 journal, in turn, send that report out to peer 17 reviewers who critique the work and decide whether 18 it is worthy of publication and/or open to 19 suggestions for improvement. 20 Q Is it fair to say that peer review helps 21 identify errors in a scientist's work? 22 A No, because we're not supposed to have any 23 errors when we send it. 24 Q Well, what does peer review add? 25 A Peer review adds the -- confirms the</p>
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<p>1 analysis of food and water also contains standard 2 methods for Campylobacter and Salmonella." 3 Q (By Mr. Jorgenson) Thank you, Professor 4 Harwood. In the paragraph you just read, you note 5 the, specifically, the importance of following 6 methods approved by the EPA or the FDA; is that 7 right? 8 A Uh-huh. 9 Q Why is that? 10 A Standard methods are important because, where 11 they exist they allow comparison of results across 12 the country, between labs. They give assurance of 13 consistency in the method of analysis. Microbiology 14 is a very methods-driven field, and so if one is 15 analyzing an organism that has regulatory 16 importance, then standard methods are really 17 necessary, again, in order to be able to compare 18 from one area of the country, one laboratory to 19 another. 20 Q Okay. Turn in this document, if you would, to 21 the page that's been Bates numbered 5581; on my 22 copy, it's the penultimate page. Turn to, if you 23 would, the penultimate paragraph; you see that, 24 "regarding 2.2.3"? 25 A Uh-huh.</p>	<p>1 interpretation of the author; in other words, are 2 the data sufficient to support the author's 3 interpretation. Peer review also reviews the form 4 in which it's presented, so is this understandable. 5 Is there enough data presented so that the reader 6 can gauge for themselves the validity of the work. 7 Q And in the field of microbiology, is there 8 room for error? 9 MR. PAGE: Object to the form. 10 THE WITNESS: Can you clarify that. 11 Q (By Mr. Jorgenson) In the field of 12 microbiology, do people make mistakes? 13 MR. PAGE: Same objection. 14 THE WITNESS: Yes. 15 Q (By Mr. Jorgenson) And peer review helps 16 uncover any mistakes or errors? 17 A Well, I have certainly uncovered errors in 18 peer review of other people's papers, so yes. 19 Q I believe you've testified you submitted two 20 affidavits to the court in this case, so let me just 21 ask that a different way. Have you submitted two 22 affidavits to the court in this case? 23 A I submitted a first affidavit, first 24 affidavit, and then a supplemental affidavit. 25 Q Okay, let's get them out. Here is your first</p>
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09:16AM	09:19AM
09:16AM	09:19AM
09:16AM	09:20AM
09:17AM	09:20AM

16 (Pages 58 to 61)

EXHIBIT O

From: Jorgensen, Jay T. [jjorgensen@sidley.com]
Sent: Friday, January 09, 2009 10:24 PM
To: Louis Bullock
Cc: bjones@faegre.com; robert.george@tyson.com; Kelly_Burch@oag.state.ok.us; fbaker@motleyrice.com; RGarren@riggsabney.com; rnance@riggsabney.com; DRiggs@riggsabney.com; dpage@riggsabney.com; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov; cxidis@motleyrice.com; lward@motleyrice.com; Bob Blakemore; bjones@faegre.com; kkleee@faegre.com
Subject: RE: Summary judgment briefs

Louis,

We'd be pleased to talk about all of these topics on Monday. Defendants are committed to the meet-and-confer process as an opportunity to resolve our differences, so we're always glad to discuss.

Jay

From: Louis Bullock [mailto:lbullock@bullock-blakemore.com]
Sent: Friday, January 09, 2009 5:42 PM
To: Jorgensen, Jay T.
Cc: bjones@faegre.com; robert.george@tyson.com; Kelly_Burch@oag.state.ok.us; fbaker@motleyrice.com; RGarren@riggsabney.com; rnance@riggsabney.com; DRiggs@riggsabney.com; dpage@riggsabney.com; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov; cxidis@motleyrice.com; lward@motleyrice.com; Bob Blakemore; bjones@faegre.com; kkleee@faegre.com
Subject: RE: Summary judgment briefs

Jay:

I note that your e-mail only refers to the meet and confer addressing "defendants' pending document requests." I believe that is probably a misstatement. I understand that we are going to address defendants' request for documents relating to scientific articles submitted by Harwood and Olsen. We can also discuss your requests concerning the lab report relating to the salmonella testing by Harwood, if you have any further questions about that. As I have reported previously, I am confident that we have provided that material. Given the limitations of your communication, I need for you to confirm that during that conference we are also going to address the following issues raised by the Plaintiff:

- 1). Defendants' demand for documents related to articles submitted for publication by our experts;
- 2). Plaintiff's request for permission for Welch and Cook to file a supplemental report covering the summer sampling at Tenkiller;
- 3). Plaintiff's request for compliance with the Court's order compelling timely production of all data, photos, maps, field notes, field books, chain of custody, QA/QC, work plans, etc. related to Defendants' sampling, and
- 4). Plaintiff's request for immediate compliance with Rule 26 requirements relating to the production of all considered materials by relevant defense experts.

If it is not your intention to address all of these items, then we need to reschedule the meet and confer until we can address all of these outstanding issues. Please confirm that we are in fact scheduled to confer over all of these items so that the conference can proceed as scheduled.

In addition to the above, it will be helpful for us to know if the Defendants plan on filing a consolidated response brief at the Circuit or whether the Plaintiff will need to prepare to file replies to a number of individual briefs.

I look forward to your cooperation on these matters.

Louis Bullock

EXHIBIT P

Arens, Sue

From: Todd, Gordon D. [gtodd@sidley.com]
Sent: Wednesday, October 01, 2008 6:21 PM
To: ornston.aem@yale.edu
Cc: arpd@science.oregonstate.edu; mgriffit@uoguelph.ca; hld@uni-bayreuth.de; aemeditor@plantpath.wisc.edu; kgaem@usa.dupont.com; skathar@unity.ncsu.edu; gram.aem@difres.dk; aem@qub.ac.uk; brakhageAEM@hki-jena.de; dcullen@wisc.edu; lleffAEMCarol@comcast.net; aem@qub.ac.uk; aemellen@uga.edu; Frank.Loeffler@ce.gatech.edu; ohlenasm@mail.cbri.umn.edu; aemlovell@biol.sc.edu; aemellen@uga.edu; parsem@u.washington.edu; parsem@u.washington.edu; zhou-aem@rccc.ou.edu; schaffner@aesop.rutgers.edu; spormann@stanford.edu; marylynn.yates@ucr.edu; Jorgensen, Jay T.
Subject: RE: Letter regarding article submitted to Applied & Environmental Microbiology
Attachments: Order denying PI - 1765.pdf



Order denying PI - 1765.pdf (5...

Dear Dr. Ornston:

I am writing to follow up on behalf of my colleague, Jay Jorgensen, who wrote to you previously regarding a manuscript submitted to Applied & Environmental Microbiology, J.L. Weidhass, T.W. Macbeth, R.L Olsen, & V.J. Harwood, Identification and Validation of a Poultry Litter-Specific Biomarker and Development of a 16S rRNA Based Quantitative PCR Assay.

As Mr. Jorgensen noted in his letter of August 11, that manuscript was prepared in the course of litigation and the authors have all been retained by the plaintiffs in a lawsuit against a number of poultry producers including our client, Tyson Foods, Inc. Last November, the plaintiffs submitted Professor Harwood's and Dr. Olson's work to the federal district court in support of a motion for a preliminary injunction, seeking to enjoin the use of poultry litter as a fertilizer in the Illinois River Watershed pending trial in September 2009. That motion was the subject of an extensive two-week hearing this past February and March, which focused significantly on the theories advanced by Dr. Olson and Professor Harwood.

Earlier this week, the federal court ruled in defendants' favor, denying the plaintiffs' motion for a preliminary injunction. In his Order, United States District Court Judge Gregory Frizzell made it a point to note that both Professor Harwood's and Dr. Olson's work failed to satisfy the standards of reliability required by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993) for the admission of scientific evidence in court. I am attaching a copy of that order for your review.

As Mr. Jorgensen mentioned in his letter, the defendants are in the process of preparing their own expert reports responding to the theories advanced by the plaintiffs' experts. The first of those reports are due October 14th, 2008, including our response to Professor Harwood. We are confident that the report prepared on behalf of our client by Dr. Mansour Samadpour and Dr. Sam Myoda will demonstrate conclusively the errors in Professor Harwood's work, including demonstrating the prevalence and multiple sources of the authors' allegedly poultry-specific "biomarker." We will forward that report to you as soon as it is filed with the Court.

If you have any questions, or if we can be of any assistance, we would welcome your call. Mr. Jorgensen will also call you in the near future to follow up.

Best regards,

Gordon Todd

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<<Order denying PI - 1765.pdf>>

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel. W.A. DREW)
EDMONDSON, in his capacity as ATTORNEY)
GENERAL OF THE STATE OF OKLAHOMA and)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT C. MILES TOLBERT, in his)
capacity as the TRUSTEE FOR NATURAL)
RESOURCES FOR THE STATE OF)
OKLAHOMA,)

Plaintiff,

vs.

TYSON FOODS, INC., TYSON POULTRY, INC.,)
TYSON CHICKEN, INC., COBB-VANTRESS,)
INC., CAL-MAINE FOODS, INC., CAL-MAINE)
FARMS, INC., CARGILL, INC., CARGILL)
TURKEY PRODUCTION, LLC, GEORGE'S, INC.,)
GEORGE'S FARMS, INC., PETERSON FARMS,)
INC., SIMMONS FOODS, INC., and WILLOW)
BROOK FOODS, INC.,)

Defendants.

Case No. 05-CV-329-GKF-SAJ

OPINION AND ORDER

This matter comes before the Court on the State of Oklahoma's Motion for Preliminary Injunction. [Docket No. 1373]. The State seeks to enjoin the defendant poultry integrators pending a trial on the merits from (1) applying poultry litter to any land within the Illinois River Watershed (the "IRW"), and (2) allowing the application of poultry litter generated at the integrators' poultry feeding operations and/or the poultry feeding operations under contract with the integrators to any land within the IRW. [Docket No. 1373 at 6].

As more fully discussed below, the Court concludes that the State's motion for an injunction pending trial on the merits must be denied. The State has not yet met its burden of proving that bacteria in the waters of the IRW are caused by the application of poultry litter rather than by other

sources, including cattle manure and human septic systems. As a result, the State has failed to meet the heightened standard for a preliminary injunction, set forth in the following section.

I. Preliminary Injunction Standard

A preliminary injunction is an extraordinary remedy, and thus the right to relief must be clear and unequivocal. *Nova Health Systems v. Edmondson*, 460 F.3d 1295, 1298 (10th Cir. 2006). Generally, in order for a party to be entitled to a preliminary injunction, that party must establish four equitable factors:

- (1) the movant will suffer irreparable injury unless the injunction issues; (2) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits.

Sumnum v. Pleasant Grove City, 483 F.3d 1044, 1048 (10th Cir. 2007); *Nova Health Systems*, 460 F.3d at 1298; *Schrier v. University of Colorado*, 427 F.3d 1253, 1258 (10th Cir. 2005).

When a case is brought pursuant to an environmental or public health statute, including the Resource Conservation Recovery Act (“RCRA”), the primary focus shifts from “irreparable injury” to concern for the general public interest. *Wilson v. Amoco Corporation*, 989 F. Supp. 1159, 1171 (D. Wyo. 1998). In *Wilson*, the U.S. District Court for the District of Wyoming concluded that “although it is not appropriate to dispense with the required showing of irreparable harm, it is permissible as part of the traditional balancing process to lessen the weight attributable to that usually dispositive factor.” *Id.* In reaching its conclusion, the court relied upon the Supreme Court’s advice (Justice White writing for the majority) that, in the absence of express Congressional intent to the contrary, a plaintiff seeking injunctive relief – even under an environmental or public health statute – still must demonstrate irreparable harm. *Wilson*, 989 F. Supp. at 1171; *Weinberger*

v. Romero-Barcelo, 456 U.S. 305, 312-313 (1982). The district court applied the traditional equitable factors, but in balancing those factors weighed heavily the general public's interest in the issuance of the injunction. Because plaintiffs in *Wilson* sought a mandatory injunction, however, they bore the burden of showing that on balance the four factors weighed compellingly in their favor. *Wilson*, 989 F.Supp. at 1171.

Similarly, in *U.S. v. Power Engineering Co.*, 10 F. Supp. 2d 1145, 1149 (D. Colo. 1998), *aff'd* 191 F.3d 1224 (10th Cir. 1999), a case in which the Environmental Protection Agency sought a preliminary injunction under RCRA, the U.S. District Court for the District of Colorado applied the four traditional equitable factors, "as modified for RCRA." *Id.* at 1149. In doing so, the court stated:

Normally, the most important equitable factor is irreparable harm. When a case is brought pursuant to an environmental or public health statute, however, the primary focus shifts from irreparable harm to concern for the general public interest. A plaintiff seeking injunctive relief, however, still must demonstrate irreparable harm in the absence of express Congressional intent to the contrary. Based on these established standards, I will apply the traditional equitable factors, as modified for RCRA, and weigh more heavily the general public's interest in the issuance of the injunction. Because the United States seeks a mandatory injunction, however, it bears the burden of showing that the four factors, when balanced, weigh compellingly in its favor.

Id. [citations omitted]. On appeal, the Tenth Circuit affirmed, using the four traditional equitable factors. 191 F.3d at 1230. As part of the traditional balancing process, this court will lessen the weight attributable to irreparable harm and will weigh heavily the general public interest in the issuance of the injunction.

Because a preliminary injunction is an extraordinary remedy and is intended merely to preserve the relative positions of the parties until a trial on the merits can be held, the Tenth Circuit

Court of Appeals has held that the moving party must meet a heightened standard when requesting one of the three types of historically disfavored injunctions. *Summum*, 483 F.3d at 1048; *Schrier*, 427 F.3d at 1258-59. The three types of disfavored injunctions are "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; (3) and preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd and remanded*, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006); *Summum*, 483 F.3d at 1048; *Schrier*, 427 F.3d at 1258. When a preliminary injunction falls into one of these categories, it "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *O Centro*, 389 F.3d at 975; *Summum*, 483 F.3d at 1048-49; *Schrier*, 427 F.3d at 1259. A party seeking such an injunction must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms. *O Centro*, 389 F.3d at 976; *Summum*, 483 F.3d at 1049; *Schrier*, 427 F.3d at 1261.

In this case, the requested preliminary injunction falls within two categories of disfavored injunctions: it would alter the status quo and it would be mandatory.¹ The status quo is the "last peaceable uncontested status existing between the parties before the dispute developed." *Schrier*, 427 F.3d at 1260 (quoting 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948, at 1136 (2d ed. 1995)). In this case, the State clearly seeks to alter the status quo. Although "determining whether an injunction is mandatory as opposed to prohibitory can be

¹The State argues, and the Court agrees, that the third category of disfavored injunction does not apply here because the State does not seek through preliminary injunction all the relief it could recover on all its claims at the conclusion of the trial on the merits.

vexing,” *O Centro*, 389 F.3d at 1006 (Seymour, J., dissenting in part), an injunction is mandatory if the requested relief “affirmatively require[s] the nonmovant to act in a particular way, and as a result ... place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction.” *Id.* at 979 (quoting *SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991)). Here, the State has both requested an injunction which would affirmatively require the defendants to act in a particular way, and which would require the Court to provide ongoing supervision to assure the defendants are abiding by the injunction.

The State has asked the Court

to direct the companies to notify their growers within one week of the Court’s order, because they do weekly visits to the growers, that further application within the Illinois River Watershed is a violation of federal law and thus prohibited under the contract. We’re asking the Court to enter an order to monitor this injunction and to maintain it pending further order of this Court following the trial of the case-in-chief next year.

[Transcript, Docket No. 1636, p. 31, line 19 to p. 32, line 1].

The State, citing *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996), contends the heightened standard does not apply because the State seeks to restrain defendants from further violations of RCRA. *Meghrig*, however, does not stand for such a proposition. Nor does it involve a motion for a preliminary injunction or the standards to be applied with respect thereto. Rather, the Supreme Court merely held that a private party cannot recover the cost of a past cleanup effort under RCRA. *Meghrig*, 516 U.S. at 488.

In sum, the Court will apply the traditional equitable factors, weighing heavily the general public’s interest in the issuance of an injunction. Because the preliminary injunction requested by

the State falls within two of the disfavored categories identified by the Tenth Circuit, the State must meet the heightened standard.

II. *Daubert* and its Application in a Motion for Preliminary Injunction

In a case where the court functions as the trier of fact, it is the Court's duty to assess and weigh the credibility of all expert witnesses, while guided by the standards of Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *Seaboard Lumber Co. v. U.S.*, 308 F.3d 1283, 1301-02 (Fed. Cir. 2002); *New York v. Solvent Chem. Co.*, 2006 WL 2640647 (W.D.N.Y. 2006). In *Daubert*, the Supreme Court reaffirmed that the trial judge is to screen scientific evidence for relevance and reliability. *Daubert*, 509 U.S. at 589.

The primary purpose of the *Daubert* filter is to protect juries from being bamboozled by technical evidence of dubious merit, as is implicit in the courts' insistence that the *Daubert* inquiry performs a "gatekeeper" function. In a bench trial it is an acceptable alternative to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled. The Federal Circuit in *Seaboard Lumber Co. v. United States* . . . , while pointing to the concern with protecting juries from confusion, did say that the *Daubert* standard must be followed in bench trials as well. But it did not say that it must be followed rigidly in such trials. *Daubert* requires a binary choice – admit or exclude – and a judge in a bench trial should have discretion to admit questionable technical evidence, though of course he must not give it more weight than it deserves.

SmithKline Beecham Corp. v. Apotex Corp., 247 F. Supp. 2d 1011 (N.D. Ill. 2003) (Posner, C.J., sitting by designation) (citations omitted), *aff'd*, 403 F.3d 1331 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 2887 (2006).

In this proceeding on the State's request for a preliminary injunction, the Court admitted all proffered expert testimony, with *Daubert* and other evidentiary considerations governing the weight to be given the evidence. Upon consideration of the evidence presented, the Court concludes that

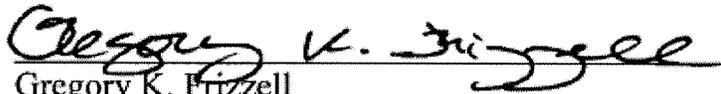
the testimony and conclusions of expert witnesses Harwood² and Olsen³ presented at the hearing are not sufficiently reliable under the standards enunciated in *Daubert*. The expert witnesses' work has not been peer reviewed or published. The testimony before this Court reveals no one outside this lawsuit who has either validated or sought to validate Harwood's and Olsen's scientific work.

III. Causation

The evidence produced to this Court reflects that fecal bacteria in the waters of the IRW come from a number of sources, including cattle manure and human waste from growing numbers of human septic systems in that area's karst topography. The record reflects levels of fecal bacteria at similar levels in rivers and streams throughout the State of Oklahoma, including waterways in whose watersheds the record does not evidence similar application of poultry waste. At this juncture in the action, the State has failed to meet the applicable standard of showing that the bacteria levels in the IRW can be traced to the application of poultry litter.

WHEREFORE, plaintiff's Motion for Preliminary Injunction [Docket No. 1373] is denied.

IT IS SO ORDERED this 29th day of September 2008.


Gregory K. Frizzell
United States District Judge
Northern District of Oklahoma

²Plaintiff presented the testimony of Professor Valerie Harwood concerning the identification of a "poultry-specific biomarker" in attempting to track the source of the microbes to poultry litter. Dr. Harwood herself described her own work and this new method as "uncharted waters."

³Plaintiff presented the testimony of Dr. Roger Olsen regarding his identification of an unique poultry-specific biological and chemical "signature"